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Supreme Court of the United States

OCTOBER TERM

No. 302

ANTHONY J. PARISSI,

Petitioner,

v.

TELECHRON, INC., and
GENERAL ELECTRIC COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES P. BAUER,
Counsel for Petitioner,
233 Broadway,
New York, N. Y.

f Counsel:
HARRY A. SMITH and
CHARLES H. ANDROS,
90 State Street,
Albany, New York.

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Supreme Court of the United States

OCTOBER TERM

No. .....

ANTHONY J. PARISSI,

Petitioner,

v.

TELECHRON, INC., and GENERAL ELECTRIC COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case.

No Opinion Below

The decision of the Court of Appeals was entered without opinion.

Jurisdiction

The decision of the Court of Appeals was entered on June 10, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254 (1).

Questions Presented

1. Is it proper to dismiss an appeal where a notice of appeal, and appeal bond, were timely mailed and received by the Clerk, into his custody, but the $5.00 Clerk's fee was untimely received?

   (a) Where the Clerk has a choice to file before receiving such fee, can the question of such fee be jurisdictional?

   (b) Where the Clerk exercises his choice and does not file the timely received appeal papers, until he receives such fee, is a nunc pro tunc order proper to require timely filing, that is, as of the day the appeal papers were put into the Clerk's custody?

Statute Involved

United States Code, Title 28:

"§ 1917. District courts; fee on filing notice of or petition for appeal.

Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or of a writ of certiorari $5 shall be paid to the clerk of the district court, by the appellant or petitioner."

Statement

On April 22, 1954, a judgment was entered in the District Court for the Northern District of New York, in Albany, N. Y., holding Petitioner's patents invalid, and dismissing his claim for unjust enrichment based on breach of confidence by Respondents.*

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* The record before the Court of Appeals is set forth herein as an Appendix to this Petition.

On May 20, 1954, the necessary notice of appeal, and appeal bond, were sent, registered mail, to the Clerk in Utica, N. Y., but the $5 filing fee was inadvertently omitted. The next day the Clerk wrote Petitioner's counsel an over-the-week-end letter (without other notice, oral or otherwise) stating he would withhold filing until he obtained the $5 fee. Such fee was immediately sent by return mail (Appendix-Affidavit).

Fearing that the Clerk might not choose to file the notice of appeal on time, an order nunc pro tunc was obtained on affidavit, signed by the District Judge having jurisdiction of the case—not for any enlargement of time beyond the 30-day appeal period for Petitioner to take action to prepare and submit his notice of appeal—but to have the Clerk act to accord the notice of appeal a filing date as of the time it was actually received; and the Clerk did so (Appendix-Order).

On June 3, 1954, Respondents moved to dismiss the appeal (Appendix-Motion).

The Court of Appeals after hearing arguments on the motion, suggested that Petitioner's counsel should have several days time to present a memorandum, and further suggested that, among other arguments, Petitioner should move under Rule 60(b). The memorandum was so presented, and the Court dismissed the appeal forthwith—without any opinion.

Specification of Errors to be Urged

The Court of Appeals erred:

1. In dismissing the appeal:

2. In dismissing the appeal without opinion and failing to indicate the basis for its decision:

3. In not denying Respondents' motion to dismiss the appeal;

4. In deciding in conflict with decisions in its own and other circuits.

Reason for Granting the Writ

1. The decision of the court below in the instant case is directly in conflict in principle and with the decisions of the following cases:

> *Oddo* v. *United States*, 171 F. 2nd 854 (2 Cir. 1949).

Where Appellant's notice of appeal was timely received by the Clerk on March 29, 1948, who did not file it until April 7, 1948 (after appeal period had expired) because the $5 filing fee did not arrive until that date. The Court in assuming jurisdiction held (p. 855):

> "The fact that the notice of appeal was unaccompanied by the filing fee does not in our opinion impair its validity. It is true that we do not find in the Criminal rules the equivalent of Civil Rule 73(a) which provides that the failure of appellants to take further steps after filing notice of appeal does not affect the validity of the appeal;"

In *Wallace* v. *United States*, 174 F. 2nd 112, 114 (8 Cir. 1949), the Clerk timely received the notice of appeal, but not the filing fee, but the court assumed jurisdiction.

> *Poykin* v. *Huff*, 121 F. 2nd 865, 873 (Ct. App. D. C. 1941).

Where the notice of appeal was timely submitted to the Judge but no fee at all was paid—the Court held:

"nor was the filing ineffective, in these circumstances, because appellant did not tender the five-dollar filing fee as required by the statute and rules".

Williams v. *United States*, 188 F. 2nd 41, 42 (Ct. App. D. C. 1951).

Where the notice of appeal was prepared in time but not received by the Clerk in time, because not delivered promptly—the court held:

"In such a situation, therefore, the filing was not ineffective because appellant did not tender the filing fee."

Mutual Life Ins. Co. v. *Phinney*, 178 U. S. 327, 337.

Where the Clerk timely received but omitted to file, this court held—

"* * * that the party seeking a review must act in time and must make a substantial compliance with all that the statute prescribes, at the same time we have been equally careful to hold that no mere technical omission which did not prejudice the rights of defendant in error should be made available to oust the appellate court of jurisdiction. We are clear that upon the showing made, the Court of Appeals had jurisdiction, and should have proceeded to dispose of the case upon its merits".

The decision of the court below is believed to be erroneous, and the conflicting decisions above are correct. In further support of Petitioner's contention, note the conflict with the following decisions:

United Drug Co. v. *Helvering* case, 108 F. 2nd 637 (2 Cir. 1940), page 638 "something must be done to indicate an intent to review". See also *Jarowski* v. *Hamburg*, 186 F. 332 (2 Cir.).

Crump v. *Hill*, 104 F. 2nd 36 (5 Cir.) that the filing of a Notice of Appeal after the required time could not divest the Circuit Court of Appeals of jurisdiction established by proceedings within the time, equivalent to filing; and on page 38 the Court says:

> "It is true enough that the starting of an appeal within the time fixed is jurisdictional and that good practice requires conformity to the formal requirements of the Rule. But it would we think be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the Rule is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights."

Federal Deposit Ins. v. *Congregation*, 159 F. 2nd 166 (2 Cir.):

> "The situation is one which demands some ready means of ascertaining the moment when occurs this 'crux of taking an appeal'. The least requirement, which will be tolerable, is that some paper shall be accessible in the records of a court upon which both judges and parties can rely."

Bouvier's Law Dictionary states:

> "Filing a paper * * * consists in placing it in the custody of the proper official * * *. In the sense of a statute requiring the filing of a paper or document, it is filed when delivered to and received by the proper officer to be kept on file."

Casalduc v. *Diaz*, 117 F. 2nd 915 (1 Cir. 1941):

> "'Filing' means delivery of the paper into the actual custody of the proper officer. The Washington, 2 Cir., 16 F. 2nd 206, 208."

4 Federal Rules Service, p. 818:

"'Filing' of notice of appeal means delivery into the actual custody of the clerk or judge within the time prescribed by statute,"

Reynolds v. *Imlay*, 118 F. 2nd 53 (Ct. App. D. C.):

"If the Court finds the notice was duly and timely offered for filing, it may exercise its power to make the record conform to the truth (Rule 75h)."

It seems almost impossible that a situation such as the present one could occur in large cities, or where the Clerk's office is in the same city where attorneys are practicing. Papers are offered and the fee immediately demanded and paid. There is not much chance for inadvertence, mistake or neglect to pay it; but those chances, when the clerk's office, as here, is in a distant city, as Utica is distant from Albany, are considerably increased.

Under Rule 5(e) of the Fed. Rules of Civil Procedure:

"• • • The Judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the Clerk."

Petitioner was not inclined to bother the District Judge in Albany with filing his Notice of Appeal. But if he had, and had failed to pay the Judge a $5 fee, it would seem, nevertheless, that under the above Rule, the Notice of Appeal would have been considered properly filed.

Under Rule 6(b) (2), F. R. C. P., there would seem to be room to act as Petitioner did:

"Upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect".

Of course, this comes under "Enlargement" and excludes that portion of Rule 73(a). But Petitioner was not acting under this latter Rule nor even seeking "Enlargement" by his nunc pro tunc order as heretofore explained. On the contrary, Petitioner sought to validate the appeal already taken by timely delivery of his appeal papers into the actual custody of the Clerk. Rule 73(a) also states:

> "A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, * * *."

It was suggested by the court below at the hearing that Rule 60(b) be invoked, and there would seem, also, to be room for Petitioner to act under this Rule. Section (a) states that—

> "Clerical mistakes * * * arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party * * *. During the pendency of an appeal, such mistakes may be corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court."

And Section (b) states—

> "* * * the court may relieve a party or legal representative from final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, * * *, or excusable neglect; * * * or (6) any other reason justifying relief from the operation of the judgment."

It is stated in 28 U. S. C. Sec. 1917 that—

> "Upon the filing of * * * an appeal * * * $5.00 sha be paid to the Clerk of the District Court, by t Appellant * * *."

This section does not imply that the fee must be pre paid, or paid in advance, or that payment of the fee is condition precedent that will defeat jurisdiction. It coul just as well be, under such extenuating circumstances as here, that the payment of the fee is a condition subsequent without jurisdictional effect on the original filing.

2. The question is of further importance besides the clearing of the conflict. While substantial rights of Petitioner are involved and should be resolved, many other persons or future litigants, apart from the actual litigants herein, will be affected by it.

It is clear that the clerk has a choice—to formally file an appeal, with or without the $5 fee.

53 Corpus Juris 618:

> "However, there is authority that he (clerk) may record the instrument on his own responsibility; and, if he does admit the instrument to record without payment of the fee, the record is not thereby invalidated. * * * and when the clerk receives and retains the instrument in his official custody, the recording is not invalidated because the fees were not prepaid."

See also 36 C. J. S. 752-7 (Filed and Fil..).

Where the clerk has a choice or discretion to formally file or not, as he sees fit, without the fee, or with a late fee, where the papers were timely received by him into his custody—the question of the fee cannot affect the jurisdiction: otherwise, the clerk would have arbitrary power, even to the extent of defeating appellate jurisdiction.

Such cases as *Mondakota Gas Co.* v. *Montana Dakota Utilities Co.*, 194 F. 2nd 705 (9 Cir. 1952) and *Turkett* v. *United*, 76 F. Supp. 769 (N. D. N. Y. 1948), where failure to pay the $5 fee was held to be fatal, also clearly imply that the Clerk has a choice. These two cases otherwise differ from the instant case in that no attempt was made to prevent a late filing while the Court still had jurisdiction and the term had not expired, by an order nunc pro tunc.

3. The order nunc pro tunc in the instant case was perfectly proper. No attempt was thereby made to permit Petitioner to take any action by way of preparing and submitting appeal papers after the lapse of the 30-day period. Such action had already been taken. The intent to appeal was clear. Respondents' rights had not been prejudiced. Petitioner's rights, following over 20 days of trial, and a 2500 page record, are substantial, and in jeopardy, as will be the rights of future litigants similarly situated.

Hill v. *Hawes*, 320 U. S. 520, 524.

The discretion of the trial judge was upheld in vacating the former judgment and entering a new judgment merely to extend the time of appeal. This court said:

> "The term had not expired and the judgment was still within the control of the trial judge for such action as was in the interest of justice to a party to the cause."

U. S. v. *Todar*, 41 F. 2d 146, 147 (7 C. C. A.) regarding nunc pro tunc orders, which states:

> "Respecting the first contention, it seems clear that to confer jurisdiction of an appeal it must have been applied for in the court which gave the judgment, within three months of its rendition. Title 28 sec.

230, U. S. Code (28 U. S. C. A. sec. 230), and many federal decisions.

"After the entry of these judgments on August 22, 1928, the record discloses no further action respecting the appeal until the order of the District Court of March 30, 1929, allowing appellant an appeal in each case nunc pro tunc as of November 19, 1928, which last date is within 3 months after the entry of the judgments."

CONCLUSION

For the foregoing reason, this petition for a writ of certiorari should be granted; or, to save the time of this Court, the decision of the lower Court vacated, and the appeal heard on the merits.

CHARLES P. BAUER,
Counsel for Petitioner,
233 Broadway,
New York, N. Y.

Of Counsel:

HARRY A. SMITH and
CHARLES H. ANDROS,
90 State Street,
Albany, New York.

Notice of Appeal, dated May 20, 1954.

In the

DISTRICT COURT OF THE UNITED STATES,

Northern District of New York.

Civil Action No. 3831.

Telechron, Inc., and General Electric Company,

Plaintiffs,

v.

Anthony J. Parissi,

Defendant.

Notice of Appeal

Notice is hereby given that defendant, Anthony J. Parissi, hereby appeals to the United States Court of Appeals for the Second Circuit, from all parts of the Final Judgment entered in this action on April 22, 1954.

Andros and Smith,
By Harry A. Smith,
Attorneys for Defendant,
90 State Street,
Albany, New York.

Dated: May 20, 1954.

To:

Whalen, McNamee, Creble and Nichols,
75 State Street,
Albany, New York.

Affidavit of Harry A. Smith, dated May 25, 1954.

In the

DISTRICT COURT OF THE UNITED STATES,

Northern District of New York.

Civil Action No. 3831

Telechron, Inc., and General Electric Company,

Plaintiffs,

v.

Anthony J. Parissi,

Defendant.

State of New York }
County of Albany } ss.:

Affidavit

Harry A. Smith, being first duly sworn, deposes and says:

That he is a member of the firm of Andros and Smith, of counsel for Anthony J. Parissi, defendant, in the above entitled action.

That on April 22nd, 1954, a judgment was entered in the District Court in favor of plaintiffs herein and from which defendant decided to appeal in accordance with Rule 73 of the Federal Rules of Civil Procedure which apparently allows thirty (30) days from the entry of judgment.

That on May 20th, 1954, he prepared a proper Notice of Appeal and, with an appeal bond in the sum of $250.00 as required attached thereto, sent the same to the Clerk's

Affidavit of Harry A. Smith, dated May 25, 1954.

Office in Utica, by registered mail, and the same was received by the Clerk the following day, namely, May 21st, one day before the expiration of the appeal date. However, your deponent inadvertently failed to enclose a check for $5.00 as a filing fee. On that day, May 21st, which was on Friday, the Clerk wrote a letter addressed to deponent stating that he would not file the Notice of Appeal until a check for $5.00 was received. Deponent did not receive this letter until Monday, May 24th, and immediately sent such check by return mail. The clerk was also immediately notified by telephone and his instructions were to refer the same to the Judge of this Court.

That deponent, on the day the Notice of Appeal was sent by registered mail to the Clerk's Office, namely May 20th, 1954, had already notified counsel for plaintiffs that a Notice of Appeal was sent to the Clerk and arranged for a conference in New York City to determine whether a stipulation as to the contents of the record to be printed could be agreed upon.

That unless the Court orders that the Clerk now file the Notice of Appeal as of the time it was received by registered mail, namely, May 21st, 1954, it is feared that defendant may be foreclosed from proceeding with his appeal.

That, therefore, an order in effect permitting filing the Notice of Appeal nunc pro tunc is being submitted herewith.

Respectfully submitted,

HARRY A. SMITH.

(L. S.)

Subscribed and sworn to before me
this 25th day of May, 1954.

CAROLYN D. FLINN,
Notary Public.

Order Nunc Pro Tunc, dated May 27, 1954.

IN THE

DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF NEW YORK.

CIVIL ACTION NO. 3831

TELECHRON, INC., and GENERAL ELECTRIC COMPANY,

Plaintiffs,

v.

ANTHONY J. PARISSI,

Defendant.

ORDER.

On the annexed affidavit of Harry A. Smith, of counsel for defendant, it is hereby ordered that the Notice of Appeal in this action (from the judgment entered on April 22, 1954) received by the Clerk of the District Court on May 21, 1954, be accorded a filing date as of the day it was received, namely, May 21, 1954.

Dated: May 27, 1954, Albany, N. Y.

/s/ JAMES T. FOLEY,
United States District Judge.

Motion to Dismiss, dated June 3, 1954.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 23120.

TELECHRON, INC. and GENERAL ELECTRIC COMPANY,

Plaintiffs-Appellees,

against

ANTHONY J. PARISSI,

Defendant-Appellant.

MOTION TO DISMISS

Appellees move this Court to dismiss this appeal on the ground of lack of jurisdiction because the notice of appeal was not filed within 30 days from the entry of the judgment appealed from, as required by law.

WHALEN, MCNAMEE, CREBLE & NICHOLS

By CHARLES E. NICHOLS Member of
Firm 75 State Street, Albany 1,
New York
Attorneys for Appellees.

Of Counsel:

CHARLES H. WALKER,
Fish, Richardson & Neave,
20 Exchange Place,
New York 5, New York.

Dated: June 3, 1954.

Decision dated June 10, 1954.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit held at the United States Court House, in the City of New York, on the 10th day of June, one thousand nine hundred and fifty-four.

Present: HON. HARRIE B. CHASE,
Chief Judge
HON. JEROME N. FRANK
HON. CARROLL C. HINCKS
Circuit Judges.

TELECHRON, INC. and GENERAL ELECTRIC COMPANY,
Plaintiffs-Appellees,

v.

ANTHONY J. PARISSI,
Defendant-Appellant.

A motion having been made herein by counsel for the appellees to dismiss the appeal for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that said appeal be and it hereby is dismissed.

Further ordered that a mandate issue accordingly.

A. DANIEL FUSARO
Clerk